79-1038

Supreme Court, U. S.
FILED
JAN 2 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF THE CLAIM OF BIRCH E. PALMER, Petitioner, -vs- THE COLORADO SUPREME COURT, 79 SC 289; COURT OF APPEALS, STATE OF COLORADO, 79 CA 0178; THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, W.C. 2 671 879; CUTLER-HAMMER, INC., DENVER, COLORADO, Employer; and AMERICAN MOTORISTS INSURANCE COMPANY, DENVER, COLORADO, Insurer, Respondents.	PETITION FOR WRIT OF CERTIORARI

Birch E. Palmer, Pro Se
2367 North 475 West
Sunset, UT 84015

J.D. MacFarlane, Attorney General
Ann Sayvetz, Asst. Attorney General
Denver, Colorado
Attorneys for Respondent Industrial Commission

WHITE AND STEELE, P.C.
Michael W. Anderson, Esq.
Denver, Colorado
Attorneys for Respondents Cutler-Hammer, Inc., and American Motorists Insurance Company

IN THE SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF THE CLAIM OF BIRCH E. PALMER, Petitioner, -vs- THE COLORADO SUPREME COURT, 79 SC 289; COURT OF APPEALS, STATE OF COLORADO, 79 CA 0178; THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, W.C. 2 671 879; CUTLER-HAMMER, INC., DENVER, COLORADO, Employer; and AMERICAN MOTORISTS INSURANCE COMPANY, DENVER, COLORADO, Insurer, Respondents.	PETITION FOR WRIT OF CERTIORARI

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Denver, Colorado

Attorneys for Respondents Cutler-Hammer, Inc., and American Motorists Insurance Company

1. Jurisdiction of the United States Supreme Court is invoked pursuant to the Order of the Colorado Supreme Court dated Oct. 23, 1979, denying the Petition for Writ of Certiorari dated September 18, 1979, wherein the Colorado Supreme Court did abuse its discretion in the following manner:

A. By ignoring the sworn testimony of Dr. Robert Berg, lung specialist of St. Luke's Hospital, Denver, Colorado, whose testimony is clearly referred to on p.3 of the Petition for Writ of Certiorari. Dr. Berg's sworn testimony at a hearing on April 11, 1978 was that petitioner in 1973 before breathing the vapors of the toxic Solvac Compound #1533, had no symptoms. As the result of breathing the toxic vapors, 50% or the petitioner's lung capacity was permanently destroyed, and that between 1973 and 1977 the petitioner's physical condition had definitely worsened.

The Medical evidence in this record will

prove before this Honorable Court that the abuse of their discretion has been exercised by the Colorado Supreme Court, the Court of Appeals of the State of Colorado, by the Industrial Commission of the State of Colorado, and by the Workmen's Compensation referee who issued the Orders in this case.

B. The Colorado Supreme Court did on Nov. 7, 1979, deny a Motion to Add New Evidence in the record of this case, filed by the petitioner on October 31, 1979, the new evidence being in the form of a court reporter's bill, dated September 2, 1977, wherein payment was made for a copy of the transcript of the first hearing held in this case on June 27, 1974, also a copy of the Order of that hearing dated July 1, 1974. Prior to this time the petitioner was never sent any notification whatsoever that the above said Order had been issued. Further, had he received a copy of the Order, he would have then perfected an appeal of the

above said Order. The Court of Appeals of the State of Colorado in their Order Affirmed dated August 23, 1979, states claimant did not perfect an appeal of the Order dated July 1, 1974 and also states claimant was notified in December 1974 that the Order dated July 1, 1974 had become final. There is no evidence in the record of this case that the claimant was sent any such notification.

The denial by the Colorado Supreme Court of the Motion to Add New Evidence to the record is absolute proof that the petitioner was not sent a copy of the first Order in this case dated July 1, 1974.

2. Jurisdiction of the United States Supreme Court is further invoked pursuant to the Order of the Court of Appeals of the State of Colorado wherein they denied the petitioner's Motion for Rehearing, dated September 13, 1979.

Further, the Mandate dated Oct. 25, 1979 by the Court of Appeals of the State of Colorado

is premature to the Order Re Mandate by the Court of Appeals of the State of Colorado, dated September 27, 1979, wherein the Mandate was thereby stayed until Oct. 29, 1979.

On that date, Oct. 29, 1979, a Motion to Recall Mandate was filed by the petitioner with the Court of Appeals of the State of Colorado. Item 3 on that Motion to Recall Mandate states: The petitioner motions that the premature Mandate issued Oct. 25, 1979 by the Court of Appeals of the State of Colorado be hereby recalled in order for the United States Supreme Court to review this case.

3. In 1973, the claimant, while employed as a machinist for Cutler-Hammer, Inc., of Denver, Colo., breathed vapors from a toxic cooling solvent, namely Solvac Compound #1533 over a period of 5 months.

On March 6, 1974 the petitioner filed a claim because of his damaged lungs with the Department of Labor and Employment, Workmen's

Compensation Division of Denver, Colorado. In a hearing held on June 27, 1974 claimant's testimony was that he had lost 51&1/2 hrs of work, 4 days of that time being spent in St. Luke's Hospital, Denver, Colo., as a result of breathing the Solvac vapors.

In the Order dated July 1, 1974, the referee determined claimant was disabled for one day by bronchitis which occurred "as a result of accident arising out of and in the course of his employment," and ordered Cutler-Hammer, Inc., of Denver, Colo., to pay disability benefits for one day and medical expenses pursuant to S8-49-101, C.R.S., 1973 (Colo.) not to exceed $20,000 and not to exceed the actual expenses incurred.

The same referee in the Second Order he issued in the case, dated Jan. 24, 1978, states on p. 2 as follows: "Careful examination of this record including medical reports admitted by the claimant in support of his Petition

to Reopen fails to disclose any medical opinion of any kind as to what may have caused claimant's lung problems were within a reasonable medical possibility caused by the conditions of his employment for Cutler-Hammer in any respect."

After the first hearing and the claimant's lung damage worsened, the doctor and hospital bills began to burden his employer, Cutler-Hammer, Inc., of Denver, Colorado, he was terminated, making further medical benefits unavailable.

4. Because of claimant's continued worsening condition, he filed a Petition to Reopen with the Department of Labor and Employment, Denver, Colo., on Jan. 3, 1977, on the grounds of a change in his physical condition. The second hearing regarding the claimant's condition was held on Sept. 12, 1977. At that hearing, the claimant gave testimony of his worsening condition. Also, there are present in

the record of this case, reports from six reputable doctors and hospital records which were presented as evidence of the claimant's worsening condition at that time.

On p.19 of the transcript of that hearing, at the claimant's request to produce another medical report from Dr. Berg, the referee stated: "I will hold the order for a medical report from Dr. Berg."

However, he did not hold the Order. Then the same referee who issued the first Order dated July 1, 1974 issued a second Order dated Jan. 24, 1978, denying all the medical reports and hospital records present in the record of this case.

5. A Motion to Set Aside Order was filed by the claimant's attorney, and a Stipulation to Set Aside the Order which had been issued prematurely was then issued by the Department of Labor and Employment.

A third hearing was held on April 11, 1978

at which time Dr. Robert Berg gave sworn testimony. Present in the first hearing held June 27, 1974 is a report by Dr. Berg, lung specialist of St. Luke's Hospital of Denver, Colo., wherein he states that claimant developed bronchitis as a result of exposure to a soluble oil over a period of time while employed at Cutler-Hammer, Inc., of Denver, Colo. According to Dr. Berg's report at the time of the first hearing in 1974, the claimant's lung damage was "mild", which is a little bit of obstruction. However, in his sworn testimony at the hearing on April 11, 1978, he stated the claimant's lung damage had gone from "mild" to "moderate", which is much more severe, involving permanent destruction of 50% of the claimant's lung capacity.

On p.9 of the transcript of the hearing on April 11, 1978, question 3 by claimant's attorney: "OK. Let's just stick to 1973 for the moment."

Answer by Dr. Berg: "So he didn't have that problem at that time."

Question to Dr. Berg: "What was your diagnosis of Mr. Palmer when you examined him in 1977?"

Answer by Dr. Berg: "Well, basically, this man had changed significantly at that time. We have "mild", which is a little bit of obstruction, to what we call "moderate", which is a more severe condition."

On p.25, question by claimant's attorney: "Is there a range that you would characterize somebody as far as percentage of impairment, if they had a moderate impairment?"

Answer by Dr. Berg: "We think of this as being about half of the lung capacity."

Question by attorney: "About 50% impairment?"

Answer by Dr. Berg: "Close to it."

On p.13, further answer by Dr. Berg: "And what it did, is it sort of left him with a

bit of plural scarring where it sort of trapped the lung and left some abnormalities on the x-ray, so that's a change."

The referee who issued all the Orders in this case only heard the testimony at the first hearing dated June 27, 1974. However, he issued a Supplemental Order dated Oct. 10, 1978, wherein he incorporated his second Order dated Jan. 24, 1978, thereby abusing his discretion in denying all sworn testimony, doctors' reports and hospital records were present in this case.

6. Sworn testimony in the transcripts of this case is medical evidence that the claimant developed his symptoms as the result of breathing the Solvac Compound #1533, also that the petitioner's condition worsened between 1973 and 1977 as testified by Dr. Berg. This is also stated in the Petitioner's Motion for Rehearing dated Aug. 25, 1979, which was denied by the Court of Appeals of the State of Colorado.

In the Affirmed Order from the Court of Appeals of the State of Colo., dated Aug.23, 1979, on P.3 it specifically states,"that claimant's condition had not worsened, further, no new evidence was presented."

The new evidence is that the claimant's condition did in fact change for the worse. The doctors' reports and Dr. Berg's sworn testimony, plus hospital records, are absolute proof that the referee of the Dept. of Labor and Employment, Workmen's Compensation Div., Denver, Colo., the Industrial Commission of the State of Colo., the Court of Appeals of the State of Colo., and the Colorado Supreme Court, by choosing to ignore the testimony of Dr. Berg that the petitioner's condition did in fact change, are in abuse of their discretion.

The Industrial Commission may grant a Petition to Reopen upon grounds of error and mistake or a change in condition. Once evidence

indicates any of the grounds, the Director is obligated to reopen the case. However, the Director has ignored his obligations, which is a further abuse of his discretion.

Respectfully submitted,

Birch E. Palmer

BIRCH E. PALMER, Petitioner
2367 North 475 West
Sunset, UT 84015

Subscribed and sworn to before me this 28 day of December, 1979.

Kay A. Bally

NOTARY PUBLIC
Residing at: Ogden Utah

Commission Expires:

10-1-80

A P P E N D I X

1. Order by Division of Labor, Workmen's Compensation Section, dated July 1, 1974, awarding claimant compensation plus medical benefits.

2. Order by Division of Labor, Workmen's Compensation Section, dated Jan. 24, 1978 denying the Petition to Reopen.

3. Supplemental Order by Div. of Labor, Workmen's Compensation Section, dated Oct. 10, 1978 incorporating Order of Jan. 24, 1978, further denying the Petition to Reopen.

4. Findings of Fact and Order by Industrial Comm., State of Colo., dated Jan 5, 1979, adopting and affirming previous Orders of the Division of Labor.

5. Final Order by the Industrial Comm., State of Colo., dated Feb. 15, 1979, affirming the previous Findings of Fact and Order.

6. Order Affirmed by the Colo., Court of Appeals, dated Aug. 23, 1979, affirming the Order from the Industrial Comm.

7. Order by the Colo., Court of Appeals dated Sep. 13, 1979, denying the Petition for Rehearing.

8. Writ of Certiorari to the Court of Appeals by the Colo. State Supreme Court, dated Oct. 23, 1979, denying the Certiorari.

9. Certiorari to the Colo. Court of Appeals from the Colo. Supreme Court denying Motion to Insert New Evidence, dated Nov. 7, 1979.

CERTIFICATE OF MAILING

I hereby certify that on the 29 day of December, 1979, I mailed a true and correct copy of the within Petition for Writ of Certiorari by depositing same in the United States Mail, postage prepaid and addressed to:

United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Colorado Supreme Court
2 - East 14th Avenue, Suite 415
Denver, Colorado 80203

Colorado Court of Appeals
2 - East 14th Avenue, Suite 303
Denver, Colorado 80203

The Industrial Commission of Colorado
1525 Sherman Street
Denver, Colorado 80203

J.D. MacFarlane, Esq.
Attorney General
1525 Sherman Street
Denver, Colorado 80203

Ann Sayvetz, Asst. Atty. General
1525 Sherman Street
Denver, Colorado 80203

Cutler-Hammer, Inc.
11250 40th Avenue
Denver, Colorado 80239

Michael W. Anderson, Esq.
1660 Lincoln, #1660
Denver, Colorado 80264

American Motorists Insurance Company
915 - 15th Street
Denver, Colorado 80202

Birch E. Palmer
BIRCH E. PALMER, Petitioner
2367 North 475 West
Sunset, Utah 84015

Subscribed and sworn to before me this 28 day of December, 1979.

Kay A. Bailey
NOTARY PUBLIC
Residing at: Ogden Ut

Commission Expires:
10-1-80

STATE OF COLORADO

BEFORE THE DEPARTMENT OF LABOR AND EMPLOYMENT
DIVISION OF LABOR

WC 2-671-879
SS 361-01-4436

IN THE MATTER OF THE CLAIM OF BIRCH PALMER,

Claimant,

vs.

CUTLER HAMMER, INC.,

Employer,

and

AMERICAN MOTORISTS INSURANCE COMPANY,

Insurer,
Respondents.

ORDER #(1)

Hearing was had in this matter at Denver, Colorado on June 27, 1974 before Referee Richard T. Goold of the Division of Labor. The Reporter was Thomas C. Rooklidge. The claimant appeared in person. The respondents did not appear.

The file reflects that notice of the hearing to be held June 27, 1974 at 9:00 A.M. was mailed to respondents and their attorneys more than ten days prior to the hearing.

The claimant has filed claims for both accident and occupational disease. The evidence is that claimant was exposed, through poor ventilation, to the fumes of a coolant known as Sol Vac for a period of about five months prior to July 3, 1973. On July 3, 1973 claimant became disabled as the result of dizziness, shortness of breath and bronchial irritation. Previously claimant had had several nondisabling episodes of these symptoms. Medical evidence indicates no neurological problem. However, claimant does exhibit some mild obstructive disease of the left anterior descending artery and right coronary artery. Also, claimant was found to be suffering mild obstructive pulmonary disease. Evidently in the opinion of the reporting physician, the coronary artery disease is unaffected by but predisposes claimant to increased symptomatology associated with the pulmonary obstructive disease. The pulmonary obstructive disease is termed mild and underlying and is evidenced by left ventricular hypertrophy and changes in cardiac rhythm. It is the examining physician's opinion that this preexisting obstructive pulmonary disease was aggravated temporarily by inhalation of the vapors of the Sol Vac coolant. This coolant contains several chemicals which are primary lung irritants. Claimant smokes which is also a primary lung irritant.

Claimant was disabled July 3, 1973 because of bronchial irritation. He returned to work July 8, 1973. Wages were sufficient to entitle claimant to maximum compensation benefits.

EXHIBIT #1

From the foregoing, the Referee concludes:

1. That claimant was disabled by bronchitis which occurred as the result of accident arising out of and in the course of his employment July 3, 1973 and returned to work July 8, 1973.

2. That the respondents are liable to the claimant for temporary total disability benefits at the rate of $84.00 per week for the day of July 7, 1973 and for medical benefits as set forth by statute.

3. Claim for occupational disease should be denied and dismissed.

4. Claim for permanent partial disability benefits should be denied and dismissed.

NOW, THEREFORE, IT IS HEREBY ORDERED: That the respondents pay compensation to the claimant at the rate of $84.00 per week for one day, July 7, 1973, for and on account of temporary total disability.

IT IS FURTHER ORDERED: That the respondents pay for the necessary medical, surgical and hospital expense incurred as a result of the accident and not to exceed $20,000.00 and in no event to exceed the actual expenses incurred.

IT IS FURTHER ORDERED: That any claim for occupational disease be, and the same hereby is, denied and dismissed.

IT IS FURTHER ORDERED: That any claim for permanent partial disability be, and the same hereby is, denied and dismissed.

IN WITNESS WHEREOF, the Division of Labor has caused these presents to be duly executed, this 1st day of July, A. D., 1974.

DIVISION OF LABOR
WORKMEN'S COMPENSATION SECTION

BY: R. T. Goold
REFEREE

RTG:dmg

STATE OF COLORADO

BEFORE THE DEPARTMENT OF LABOR AND EMPLOYMENT
DIVISION OF LABOR

WC 2-671-879

IN THE MATTER OF THE CLAIM OF)
BIRCH E. PALMER,)
Claimant,)
)
vs.)
)
CUTLER-HAMMER, INC.,) O R D E R
Employer,)
) #2
and)
)
AMERICAN MOTORISTS INSURANCE COMPANY,)
)
Insuror,)
Respondents.)

Hearings were had in this matter June 27, 1974 before Hearing Officer Richard T. Goold and Reporter Thomas Rooklidge and September 12, 1977 before Hearing Officer James L. Carpenter and Reporter Beverly Howard. At the hearing held June 27, 1974, the Claimant appeared in person. The Respondents did not appear.

At the hearing held September 12, 1977, the Claimant appeared in person and by Robert Vockrodt. The Respondents appeared by Michael Anderson.

After hearing held June 27, 1974, Order was entered July 1, 1974 awarding the Claimant one day's compensation benefits on account of temporary total disability and medical benefits in connection with an accident which was found to have occurred on or about July 3, 1973. In that Order, claim for permanent partial disability and claim for occupational disability and disease was denied.

The aforementioned Order became final and all matters therein res judicata.

On January 4, 1977, Petition to Reopen was filed alleging that the condition resulting from the aforementioned accident had worsened. Hearing was had concerning the Claimant's Petition to Reopen on September 12, 1977.

At the hearing concerning the Petition to Reopen, Counsel for the Claimant indicated that he wished to prove that the Claimant suffered an occupational disease as a result of inhaling toxic substances over a period of years during the course of his employment for the respondents, Cutler-Hammer, Inc. The Hearing Officer at that time ruled that this issue was res judicata and that the Respondents' objections to consideration of the issue of whether the Claimant suffered an occupational disease arising out of conditions under which he was employed for the Respondent, Cutler-Hammer, Inc., should be sustained.

{ By agreement of the parties, the record in this case has been submitted to the undersigned Hearing Officer for order. }

I, Birch Palmer or my attorney did not even know that Richard T. Goold was going to rule on this order, and we most certainly did not agree.

Signed Birch Palmer

EXHIBIT #2

A perusal of this record in its entirety indicates that the Claimant suffers from cardiovascular disease and pulmonary disease. As a result of the pulmonary disease, the Claimant has a decreased lung function which causes him to be dyspnaec upon exertion. It is the Claimant's contention that this lung function problem was caused by inhalation of vapor from lubricants used during the course of his occupation as a machinist over a number of years.

Careful examination of this record, including medical reports admitted by the Claimant in support of his Petition to Reopen, fails to disclose any medical opinion of any kind as to what may have caused Claimant's lung problem and, more specifically, no medical opinion of any kind which would indicate that Claimant's lung problems were within a reasonable medical probability or even within a medical possibility caused by the conditions of his employment for Cutler-Hammer in any respect.

Likewise, there is no evidence in this record that the attack of bronchitis suffered by the Claimant on or about July 3, 1973, had in any way worsened or that the Referee's Order finding that this was an accident did in any way constitute an error.

From the foregoing, the Hearing Officer concludes:

That the Petition to Reopen filed herein January 4, 1977 should be denied and dismissed.

NOW THEREFORE, IT IS HEREBY ORDERED: That the Petition to Reopen filed herein January 4, 1977 be and the same is hereby denied and dismissed.

IN WITNESS WHEREOF, the Division of Labor has caused these presents to be duly executed this 24th day of January, A.D. 1978.

DIVISION OF LABOR
WORKMEN'S COMPENSATION SECTION
FOR THE DIRECTOR

BY /s/ Richard T. Goold
RICHARD T. GOOLD
HEARING OFFICER

RTG/mbb

STATE OF COLORADO
DEPARTMENT OF LABOR AND EMPLOYMENT
DIVISION OF LABOR

IN THE MATTER OF THE CLAIM OF BIRCH E. PALMER, Claimant, vs. CUTLER-HAMMER, INCORPORATED Employer, and AMERICAN MOTORISTS INSURANCE COMPANY Insurer, Respondents.	W. C. 2-671-879 SUPPLEMENTAL ORDER

Following the entry of Findings of Fact and Order dated January 24, 1978, it was determined that that Order was premature and this Hearing Officer entered order holding it in abeyance.

Further hearing was held April 11, 1978, before Hearing Officer James L. Carptenter with Court Reporter Marjorie Goodenough. Transcript of that hearing has been placed in the Division of Labor's file in this case and the entire file referred to the undersigned Hearing Officer for review, findings and order.

The Hearing Officer having now reviewed the entire file, does find:

That the Findings of Fact and Order dated January 24, 1978, are correct and should be reinstated.

NOW THEREFORE, IT IS HEREBY ORDERED:

That the Findings of Fact, Conclusions and Order herein executed January 24, 1978 are hereby reinstated and adopted herein as if re-written in full.

IN WITNESS WHEREOF, the Division of Labor has caused these presents to be duly executed this 16 day of October, A.D., 1978.

DIVISION OF LABOR
WORKMEN'S COMPENSATION SECTION
FOR THE DIRECTOR

By: _____
Richard T. Goold, Hearing Officer
Department of Administration

EXHIBIT # 3

BEFORE THE INDUSTRIAL COMMISSION OF COLORADO
1525 Sherman St.
Denver, CO 80203
839 2446

IN THE MATTER OF THE CLAIM OF BIRCH E. PALMER, CLAIMANT, VS. CUTLER-HAMMER, INCORPORATED, EMPLOYER, AND AMERICAN MOTORISTS INSURANCE CO. INSURER, RESPONDENTS.	W.C. 2 671 879 FINDINGS OF FACT AND ORDER

The Industrial Commission has examined the records in the above entitled cause including all of the documents, papers, arguments as submitted in writing, and the transcript of testimony, and now being sufficiently advised in the premises, finds:

That the findings of fact and conclusion of law of the referee of the Division of Labor are supported by competent and substantial evidence and that the decision of said referee was made in accordance with the law.

IT IS, THEREFORE, ORDERED: That the findings of fact, conclusions of law and the decision of the referee in this matter are hereby adopted and affirmed as the decision of the Industrial Commission of the State of Colorado.

This decision of the Industrial Commission is final unless a Petition to Review this decision is filed within fifteen (15) days from the date this decision is mailed.

Dated at Denver, Colorado January 5, 1979.

INDUSTRIAL COMMISSION OF COLORADO

Attest: _____
Paul H. Leibowitz
Executive Secretary

_____
Kenneth C. Russell
_____
Mike L. Baca
Commissioners

Certified: Copies mailed to parties here listed January 5, 1979:

Birch Palmer, 2367 North 475 West, Sunset, Utah
Cutler & Hammer, Inc., 2650 West Second Avenue, Denver, CO 80219
American Motorists Insurance Co., 910 15th St., Denver, CO 80202
Michael W. Anderson, Atty., 1660 Lincoln #1660, Denver, CO 80264
Robert Vodkrodt, Atty., 668 Peoria St., Aurora, CO 80011

wc/la

_____ Clerk
D. Henrichs

EXHIBIT # 4

BEFORE THE INDUSTRIAL COMMISSION OF COLORADO
1525 Sherman St.
Denver, CO 80203
839 2446

IN THE MATTER OF THE CLAIM OF BIRCH E. PALMER, CLAIMANT, VS CUTLER-HAMMER, EMPLOYER, AND AMERICAN MOTORISTS INSURANCE CO., INSURER, RESPONDENTS.	W.C. _____ FINAL ORDER

The above entitled cause comes before the Commission upon Petition to Review its Findings of Fact and Order issued January 5, 1979. The Commission, having reviewed the entire record hereby affirms the previous Findings of Fact and Order.

This affirmation by the Industrial Commission of its previous Findings of Fact and Order makes the Findings of Fact and Order the final decision of the Industrial Commission of Colorado.

This decision of the Industrial Commission is final unless within twenty (20) days from the date of mailing hereof an action to review it is commenced in the Colorado Court of Appeals.

Dated at Denver, Colorado February 15, 1979.

INDUSTRIAL COMMISSION OF COLORADO

Attest:

Paul H. Leibowitz
Executive Secretary

Mike L. Baca
Kenneth C. Russell
Commissioners

Certified: Copies mailed to parties here listed February 15, 1979:

Birch E. Palmer, 2367 North 475 West, Sunset, Utah
Cutler-Hammer, Inc., 2650 West Second Ave., Denver, CO 80219
American Motorists Ins. Co., 910 15th St., Denver, CO 80202
Michael W. Anderson, Atty., 1660 Lincoln #1660, Denver, CO 80264
Robert Vodkrodt, Atty., 668 Peoria St., Aurora, CO 80011

D. Henrichs Clerk

EXHIBIT #5

COLORADO COURT OF APPEALS

No. 79CA0178

IN THE MATTER OF THE CLAIM OF BIRCH E. PALMER, Petitioner, v. INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, CUTLER-HAMMER, INC., Employer, and AMERICAN MOTORISTS INSURANCE COMPANY, Insurer, Respondents.	

NOT SELECTED FOR PUBLICATION
NOT TO BE CITED AS PRECEDENT
IN ANY COLORADO COURT.

Review of Order from the Industrial Commission of the State of Colorado

DIVISION I — ORDER AFFIRMED
Opinion by JUDGE SILVERSTEIN
Coyte and Kelly, JJ., concur

Birch E. Palmer, Pro Se
Sunset, Utah

J. D. MacFarlane, Attorney General
Ann Sayvetz, Assistant Attorney General
Denver, Colorado

Attorneys for Respondent Industrial Commission

White and Steele, P.C.
Michael W. Anderson
Denver, Colorado

Attorneys for Respondents Cutler-Hammer, Inc. and American Motorists Insurance Company

COURT OF APPEALS
STATE OF COLORADO

Opinion filed and judgment entered on the 23rd day of August, 1979

SEAL

Clerk of the Court

EXHIBIT #6

Claimant petitions for review of the final order of the Industrial Commission denying his petition to reopen his claim. We affirm

While employed as a machinist for Cutler-Hammer, Inc., claimant was exposed over a period of five months to vapor fumes from a cooling solvent which he claimed damaged his lungs causing wheeziness, shortness of breath, permanent diminished lung capacity, and lowered resistence to infection. After hearing claimant's testimony and reviewing doctors' reports submitted to him, the referee, in an order entered in July 1974, determined claimant had a pre-existing weakened lung condition which was temporarily aggravated by the solvent vapors, that the solvent contained lung irritating chemicals, and that claimant's smoking also contributed to his lung irritation. The referee determined claimant was disabled for one day by bronchitis which occurred as a result of an accident arising out of and in the course of his employment, and ordered Cutler-Hammer to pay disability benefits for one day and medical expenses pursuant to §8-49-101, C.R.S. 1973. The referee denied and dismissed claimant's occupational disease and permanent partial disability claims. Claimant did not perfect an appeal of this order; he was notified in December 1974 that the referee's order had become final.

In January 1977 claimant filed a petition to reopen pursuant to §8-53-119, C.R.S. 1973, alleging mistake and a change in his condition. Two hearings were held before a referee who denied the petition, finding no change in claimant's condition attributable to his exposure to the solvent vapors and denying reconsideration of the original dismissal of the occupational disease claim because the dismissal was not appealed. On review, the Industrial Commission adopted the supplemental order and affirmed denial of the petition to reopen.

The decision to reopen a claim for compensation rests within the discretion of the Industrial Commission, and absent fraud or abuse of that discretion, that decision is binding. Hoover v. Industrial Commission, 156 Colo. 147, 397 P.2d 223 (1964). Thus, the sole issue presented here is whether the evidence justifies the denial of the petition to reopen.

The referee found claimant produced no medical opinion that the solvent vapors possibly caused his lung ailments and found that claimant's condition had not worsened. Since the referee's findings are supported by competent evidence, they are binding on review. American Metal Climax, Inc. v. Cisneros, ___ Colo. ___, 576 P.2d 553 (1978).

Further, it was not an abuse of discretion for the Industrial Commission to refuse to relitigate the occupational disease issue where no new evidence was presented, and the referee determined the reopening would constitute an improper review when no petition for review was filed. Industrial Commission v. Cutshall, 164 Colo. 240, 433 P.2d 765 (1967).

Claimant implies Cutler-Hammer failed to pay his medical expenses upon his termination as an employee. This claim is not in a posture for review. It must first be presented to the referee for determination and follow its due procedural course before it is subject to our jurisdiction. Industrial Commission v. Plains Utility Co., 127 Colo. 506, 259 P.2d 282 (1953); Gerber v. Erbert Homes, 28 Colo. App. 210, 471 P.2d 428 (1970).

Order affirmed.

JUDGE COYTE and JUDGE KELLY concur.

IN THE COURT OF APPEALS OF THE STATE OF COLORADO

No. 79CA0178

In the Matter of the Claim of:

BIRCH E. PALMER,

Petitioner,

vs.

THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO,

CUTLER_HAMMER, INC.,

Employer, and AMERICAN MOTORISTS INSURANCE COMPANY, Insurer,

Respondents.

ORDER #7

Upon consideration of the Petition for Rehearing filed by the Petitioner herein, said Petition is hereby DENIED.

Unless otherwise ordered MANDATE will issue September 20, 1979.

BY THE COURT, JUDGE SILVERSTEIN, COYTE AND KELLY, JJ.

Dated: September 13, 1979

COURT OF APPEALS SEAL COLORADO

COPIES MAILED TO:
COUNSEL OF RECORD
Trl. Ct. Judge - Trl. Ct. Clerk
AND N/A
ON: 9-13-79
BY:
COLORADO COURT OF APPEALS

If certiorari to the Supreme Court is planned and a stay of issuance of mandate desired, petition for such stay must be filed in the Court of Appeals prior to the above date of issue.

EXHIBIT # 7

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 79SC289 September Term, 19 79

IN THE MATTER OF THE CLAIM OF BIRCH E. PALMER,

Petitioner,

v.

INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, CUTLER-HAMMER, INC., Employer, and AMERICAN MOTORISTS INSURANCE COMPANY, Insurer,

Respondents.

CERTIORARI TO THE COURT OF APPEALS

NO. 79CA0178

Supreme Court
State of Colorado
Certified to be a full, true and correct copy

OCT 23 1979

DAVID W. BREZINA
Court Clerk of the Supreme Court
Seal By Joan McIntyre
Deputy Clerk

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.

OCTOBER 22 ,1979

By the Supreme Court
Sitting En Banc

xc:

Mac Danford, Clerk
Court of Appeals

Birch E. Palmer, Esq.
2367 North 475 West
Sunset, Utah 84015

Cutler-Hammer, Inc.
11250 East 40th Avenue
Denver, CO 80239

Ann Sayvetz,
Assistant Attorney General
1525 Sherman Street, 3d fl.
Denver, CO 80203

The Industrial Commission
of Colorado
1525 Sherman Street
Denver, CO 80203

Michael W. Anderson, Esq.
1660 Lincoln, #1660
Denver, CO 80264

American Motorists Insurance Co.
915 15th Street
Denver, CO 80202

EXHIBIT # 8

IN THE SUPREME COURT OF THE STATE OF COLORADO

79 SC 289

IN THE MATTER OF THE CLAIM OF BIRCH E. PALMER, Petitioner, vs. INDUSTRIAL COMMISSION OF THE STATE OF COLORADO; CUTLER-HAMMER, INC., Employer; AMERICAN MOTORISTS INSURANCE COMPANY, Insuror, Respondents.	)	Certiorari to the Court of Appeals 79 CA 0178

Upon consideration fo the Mtion to Insert New Evidence in the Record of This Case, and being sufficiently advised in the premises,

It Is This Day Ordered that said Motion be, and the same hereby is, Denied.

BY THE COURT, NOVEMBER 6, 1979.

cc: Birch E. Palmer
2367 N. 475 W.
Sunset, Utah 84015

J.D. MacFarlane, Attorney General
Ann Sayvetz, Assistant A.G.
1525 Sherman St
Denver , Co 80203

The Industrial Commission
of the State of Colorado
1525 Sherman St
Denver, Co 80203

Cutler-Hammer, Inc.
11250 East 40th Ave.
Denver, Co 80239

Michael W. Anderson
Attorney at Law
1660 Lincoln, #1660
Denver, Co 80264

American Motorists Insurance Co.
915 15th St
Denver, Co 80202

Supreme Court
State of Colorado
Certified to be a full, true and correct copy
NOV 7 1979
DAVID W. BREZINA
Court Clerk of the Supreme Court
Seal By _____ Deputy Clerk

EXHIBIT # 9

Supreme Court, U.S.
FILED
JAN 29 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1979

No. 79-1038

IN THE MATTER OF THE CLAIM
OF BIRCH E. PALMER,

Petitioner,

vs.

THE INDUSTRIAL COMMISSION
OF THE STATE OF COLORADO;
CUTLER-HAMMER, INC., Employer;
and AMERICAN MOTORISTS
INSURANCE COMPANY, Insuror,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION

WHITE AND STEELE, P.C.
Lowell White
Michael W. Anderson

Attorneys for Respondents,
Cutler-Hammer, Inc. and
American Motorists Insurance
Company

1660 Lincoln Center Building
1660 Lincoln Street
Denver, Colorado 80264
Telephone: (303) 839-1133

J. D. MacFARLANE
Attorney General

RICHARD F. HENNESSEY
Deputy Attorney General

MARY J. MULLARKEY
Solicitor General

TIMOTHY R. ARNOLD
Assistant Attorney General
Human Resources Section

Attorneys for Respondent,
Industrial Commission

1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
Telephone: (303) 839-3611

INDEX

Page

ARGUMENT IN OPPOSITION: THE COURT LACKS JURISDICTION BECAUSE NO FEDERAL QUESTION IS PRESENTED 1

CONCLUSION 4

In the
Supreme Court of the United States

October Term, 1979

No. 79-1038

IN THE MATTER OF THE CLAIM
OF BIRCH E. PALMER,

Petitioner,

vs.

THE INDUSTRIAL COMMISSION
OF THE STATE OF COLORADO;
CUTLER-HAMMER, INC., Employer;
and AMERICAN MOTORISTS
INSURANCE COMPANY, Insuror,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF COLORADO**

BRIEF IN OPPOSITION

ARGUMENT IN OPPOSITION: THE COURT LACKS JURISDICTION BECAUSE NO FEDERAL QUESTION IS PRESENTED

Petitioner, a workmen's compensation claimant before the Industrial Commission of the State of Colorado, contends that the jurisdiction of the United States Supreme Court should be invoked because of a denial of his workmen's compensation claim by the Industrial Commission of the State of Colorado, which denial was affirmed by the Colorado Court of Appeals. The Colorado Supreme Court, by order of

October 23, 1979, denied the Petitioner's Writ of Certiorari to that court.

The Supreme Court's jurisdiction to review state supreme court decisions on a petition for writ of certiorari is found at 28 U.S.C. § 1257 as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question of where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Nowhere does the petition set forth an adequate basis for the Supreme Court to take jurisdiction of this case. Rather, the petition simply alleges that the Colorado Supreme Court abused its discretion in its failure to review Petitioner's case. Not only does it fail to state a federal question as required by 28 U.S.C. § 1257, but it fails to comply with the requirements of Rule 23 1.(b)(iii) and (f), Supreme Court Rules which require the petition to set forth the statutory provisions believed to confer jurisdiction on the Supreme Court as well as the stage and manner in which the federal questions sought to be reviewed were raised.

The Colorado Court of Appeals in this case has made a determination which dealt fully and accurately with the claimant's contentions.[1] The Colorado Court of Appeals made

[1] *In the Matter of the Claim of Birch E. Palmer v. Industrial Commission of the State of Colorado, et al.*, No. 79CA0178 (Colo. App., Aug. 23, 1979). (Included in Petition as Exhibit #6.)

a determination that the original administrative agency-referee order of July 1974, in which Petitioner was granted benefits for one day of lost work, which he did not appeal, could not properly be re-opened by a claim alleging mistake and a change of condition, and upheld the Industrial Commission referee in his finding that Petitioner's change in condition was not caused by the original accident. Since these findings of the referee were supported by competent evidence, they were found to be binding upon review by the appellate court.

Petitioner was afforded a hearing before the referee, with review by the Colorado Industrial Commission and the Colorado Court of Appeals followed by the denial of a petition for certiorari by the Colorado Supreme Court.

Petitioner asks this court to review a factual determination, one of causation of a worsened physical condition, which was made within the discretionary authority of the state Division of Labor and the state Industrial Commission. The exercise of discretion was upheld as supported by competent courts, and is not the proper subject of Supreme Court review.

The Petitioner has cited selected testimony from the administrative hearing but neglects to cite the specific testimony that was relied upon by the Court of Appeals in refusing to overturn the decision of the Industrial Commission referee. Further Petitioner attempts to collaterally attack an earlier decision which became binding due to his failure to appeal. This attempt was not successful in the state appellate courts, and should not succeed here.

There is no federal question raised in the petition, no federal question has ever been raised in the proceedings to date, and there is no jurisdictional basis on which this court may grant the petition.

CONCLUSION

The Petition for Writ of Certiorari fails to state an appropriate basis for jurisdiction, contrary to Rule 23, Supreme Court Rules, and further the petition fails to present a federal question such that this Court does not have jurisdiction pursuant to 28 U.S.C. § 1257(3). For these reasons the petition should be denied.

Respectfully submitted,

WHITE AND STEELE, P.C.
Lowell White
Michael W. Anderson

Attorneys for Respondents,
Cutler-Hammer, Inc. and
American Motorists Insurance
Company

1660 Lincoln Center Building
1660 Lincoln Street
Denver, Colorado 80264

J. D. MacFARLANE
Attorney General

RICHARD F. HENNESSEY
Deputy Attorney General

MARY J. MULLARKEY
Solicitor General

TIMOTHY R. ARNOLD
Assistant Attorney General
Human Resources Section

Attorneys for Respondent,
Industrial Commission

1525 Sherman Street, 3rd Floor
Denver, Colorado 80203

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of January, 1980, a true and correct copy of the foregoing BRIEF IN OPPOSITION, was mailed, postage prepaid, and properly addressed to the following:

Clerk of the Court
Supreme Court of the United
States
One First Street, N.E.
Washington, D.C. 20543

Mr. Birch E. Palmer
2367 North 475 West
Sunset, Utah 84015

Colorado Supreme Court
Two East 14th Avenue
Denver, Colorado 80203

Colorado Court of Appeals
Two East 14th Avenue
Denver, Colorado 80203